Filed 1/29/10 P. v. Cole CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ELONDA RENE COLE, Defendant and Appellant.	E047058 (Super.Ct.No. RIF144399) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed in part with directions.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Elonda Cole, of grand theft of a car by false pretenses (Pen. Code, § 487, subd. (d)(1)),[1] second degree burglary (§ 459), possessing/passing a fictitious check (§ 476), identity theft (§ 530.5, subd. (a)), possession of methamphetamine for sale (Health & Saf. Code, § 11378) and possession of marijuana for sale (Health & Saf. Code, § 11359). In bifurcated proceedings, she admitted having suffered three prior convictions for which she served prison terms (§ 667.5, subd. (b)). She was sentenced to prison for 9 years, 4 months, and appeals, contending her convictions for theft and burglary were based on an erroneous theory of law and sentencing error occurred. We reject her first contention and agree with portions of the latter. We remand the case to allow the trial court to either state reasons for imposing consecutive sentences on the check, identity theft and drug convictions, and if none exist, to impose concurrent sentences for them. We further order the trial court to stay the sentence for the burglary pursuant to section 654 and to make other changes, as set forth below, in the current minutes of the sentencing hearing and when completing the amended abstract of judgment and minutes of the sentencing hearing upon remand. Otherwise, we affirm.

FACTS

Because facts concerning the identity theft and drug possession convictions are not relevant to this appeal, they will be omitted.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

We quote from defendant's statement of facts, thusly, "At some point in 2007, [defendant] obtained the bank account number of REO Asset Management . . . and ordered checks with REO's name and account number but with her own address. [Citations.] She then wrote checks from the REO account, including a $50,000 check to Tanisha Perry [with whom she was living when she was arrested]. [Citations.] On July 19, 2007, the $50,000 check was deposited into the Washington Mutual Account of Tanisha Perry. [Citations.] [¶] . . . [O]n July 28, 2007, a cashier's check for $20,000 was drawn from Tanisha Perry's account and made out to [defendant]; $29,000 in cash was drawn from the account at the same time. [Citations.]"

The financial manager of a car dealership testified that on July 28, 2007, defendant agreed to pay cash to purchase one of the dealership's cars. Defendant gave the dealership $16,144.11 in cash and the above-mentioned $20,000 cashier's check. After defendant took delivery of the car, her bank called the dealership and said that the cashier's check was going to be returned to the dealership for stop payment. The cashier's check never went through. The dealership kept the $16,144.11 in cash and got the car back 20 days later. The financial manager had relied on the fact that the cash defendant gave him and the cashier's check were legitimate in finalizing the purchase of the car.

Both the dealership and law enforcement authorities attempted to track defendant down through the various addresses and phone numbers she had supplied to the former, but to no avail. When defendant was finally located by the police, she admitted that she

had received numerous calls from the dealership and from the police, but chose to not respond to them.

ISSUES AND DISCUSSION

1. *Legally Incorrect Theory of Guilt for Grand Theft by False Pretenses*

During argument to the jury, the prosecutor said, initially and generally of the grand theft by false pretenses charge, "[D]efendant went to [the dealership] with fraudulent money. Money that wasn't hers. . . . She had money that came from [REO Asset Management's] account . . . . [¶] . . . She had the cashier's check that was $20,000 worth of money that wasn't hers." In response to defense counsel's argument that defendant's failure to pay the purchase price for the car was a civil and not a criminal matter, the prosecutor said, during closing argument, "[W]hen she showed up [at the dealership] with the $16,000 and [the] $20,000 cashier's check, she was using somebody's else's money. . . . Fictitious, fraudulent checks. Those are crimes.

Specifically addressing the first element of the charged grand theft by false pretenses, i.e., that the defendant knowingly and intentionally deceived the dealership by false or fraudulent representation or pretense, the prosecutor argued that defendant made a false representation, which was, "the money that the defendant gave. When you go to a store and you purchase something, you're saying that the money . . . is legitimate. It's your money. . . . You can't be purchasing items with other people's monies. That's fraud. That's theft." The prosecutor also pointed out that the financial manager had testified that he relied on the fact that he thought the cash and cashier's check defendant gave him were legitimate.

As to the element that "[t]he false pretense was accompanied by either a writing or false token or there was a note or memorandum of the pretense signed or handwritten by the defendant" and a false token is "a document or object that is not authentic, but appears to be, and is used to deceive", the prosecutor said, "There's the contract [for the sale of the car]. She's saying . . . [this is] her money—this is a legitimate deal . . . . We know that's not true. [¶] . . . [A]lso, we have the cashier's check itself. It's a false token. Fake cashier's check comes from funds that do not belong to her."

Defendant begins his attack on the legal sufficiency of the People's theory of guilt by stating that the cashier's check was valid. It was not. It did not get "paid" and the dealership collected no money from it. Defendant also asserts that "the People did not argue that the cashier's check was invalid . . . ." However, we see no difference between the People's term for it ("fake" and "false token") and "invalid." Finally, defendant asserts, "[Defendant] paid the full purchase price of the [car] with cash and a valid cashier's check." If this were true, the dealership would not have been left "holding the bag" for $20,000.

Next, defendant asserts that because the People invited the jury to convict her on the basis that the cash and cashier's check were not her money, "it allowed the jury to convict [defendant] without finding that she had the required intent to defaud." Nothing could be further from the truth.

Addressing the intent element of the offense, i.e., that "defendant knowingly and intentionally deceived [the dealership] by false or fraudulent representation or pretense . . . intending to persuade [the dealership] to let [her] take possession and

ownership of the [car] . . . and when [she] acted, she intended to deprive the [dealership] of the property permanently" the prosecutor said, in addition to what has already been reiterated, "[T]he reason she came in [to the dealership] with the . . . fake cashier's check" was to persuade the dealership to let her have the car. The prosecutor continued, "Her only intent was to get the car. . . . [S]he was using that fraudulent cashier's check. We know she intended to do that. She intended to have the dealership rely on her representation, and she wanted to get the car in return. [¶] . . . [¶] . . . [S]he intended to keep the car."

Defendant cites no authority for her assertion that the purchase of goods with stolen money does not constitute theft, particularly, where, as here, the seller does not obtain the full purchase price because a substantial portion of it is not paid to the seller.

Defendant also contends that the prosecutor's argument allowed the jury to find that the cashier's check was a false token simply because it was funded with stolen money. This is an inaccurate representation of the People's argument. The cashier's check constituted a false token because it was not what it was impliedly represented by defendant to be, i.e., a legitimate check that the dealership could cash, deriving $20,000 from it. And it was not so because it was funded with stolen monies.

Defendant cites *People v. Whitlow* (1952) 113 Cal.App.2d 804, 808 (*Whitlow*), for the proposition that "a valid check, even one obtained by fraud, cannot be a false token." However, *Whitlow* was charged with willfully and fraudulently prescribing certain drugs for a patient who was not then under his care for anything other than narcotics addiction. (*Id*. at p. 806.) The question was whether the violation of another section, which

prohibited the issuance of a writing purporting to be a prescription which is false (containing untrue statements, such as the name or address of the patient) or fictitious (such as if it were a complete forgery) in any respect, was necessarily included in the charged offenses. (*Ibid.*) The court rejected defendant's argument that as a result of the use of the word "false" in the latter section, a prescription, otherwise regular, if used in a manner so as to violate the former, becomes a false document. (*Id*. at pp. 807-808.) The appellate court said, "'A writing which is genuine and contains no false statements of fact cannot be a 'false token or writing.' [Citation.]" (*Id*. at p. 808.)[2] Contrary to defendant's repeated assertions, the cashier's check was not genuine. A cashier's check is an immediately enforceable promise to pay. The dealership was never paid the $20,000.

Finally, defendant cites *People v. Mason* (1973) 34 Cal.App.3d 281 for the proposition that a "check cannot be . . . the source of the implied false representation and the false token that corroborates the making of the representation." In *Mason*, the defendant paid in part for a car with a check he knew did not have sufficient funds to back it. (*Id*. at p. 284.) The appellate court reversed his conviction for theft of the car by false pretenses because the only false pretense was the implication, when he handed the check to the salesman, that he had sufficient funds in his account to cover it. The appellate court concluded, without citing any authority, that the corroboration

---

[2] In support of this, the *Whitlow* court cited *People v. Beilfuss* (1943) 59 Cal.App.2d 83, which defendant also cites. In *Beilfuss*, the appellate court held that a check obtained by false pretenses was not a false token or writing because the check itself was genuine and had been cashed by the defendant. (*Id.* at p. 91.) Here, in contrast, the dealership could not cash the cashier's check because it *was not* genuine.

requirement of a writing, false token or memorandum is not satisfied by the NSF check itself where the only false pretence is that implied from the handing over of the check itself. (*Id*. at p. 288.) No other published decisions have adopted this holding. Moreover, the check here was not an NSF check, but a check that was never paid because it was fraudulent.

Defendant contends that the prosecutor's argument allowed him to "shortcut the question of whether [defendant], at the time she entered the dealership and purchased the [car], had the intent to later stop payment on the cashier's check, and thus had the intent to commit theft and burglary." First, the prosecutor's argument, as well as the instructions to the jury, clearly set forth the correct requirement of intent. Second, and more importantly, there was no evidence that *defendant* placed the stop payment on the check.[3]

2. *Legally Incorrect Theory of Guilt for Burglary*

Repeating what we have already rejected, defendant contends the People's theory of her guilt of burglary was incorrect.

She also argues that it was incorrect because the prosecutor did not argue that defendant had to have the intent to defraud the dealership when she entered it and bought the car. However, portions of the prosecutor's argument which we have set forth, *ante*, belie this. Additionally, and more specifically, the prosecutor said of the charged

---

[3] Moreover, it makes no sense that she could have, since she was only the payee and not the payor, who is customarily the only person, beside the bank, that is empowered to put a stop payment on a check.

burglary, "When she entered [the dealership] she intended to commit theft." Of course, the theft was by fraud.

3. *Sentencing*

a. *Section 654*

1. *Burglary*

The parties agree that since the intent and objective for the burglary was the same as for the grand theft by false pretenses, the sentence for the former should be stayed pursuant to section 654.

2. *Uttering a Fictitious Check*

The prosecutor argued to the jury that defendant possessed or passed a fictitious check for the payment of money or property by having made, possessed and used the REO Asset Management check which went into the Washington Mutual account, which funds were then partially withdrawn, inter alia, in the form of a cashier's check, which she used to obtain the car. Defendant contends that the evidence did not show that she had intent to use the $50,000 check for anything other than purchasing the car, so section 654 prohibits punishing her for both offenses. However, defendant did not spend all of the $29,000 in cash withdrawn from her roommate's account on the car—she gave the dealership a little over $16,000 of it, leaving her with a little less than $13,000 in cash. Therefore, she used the $50,000 check for the payment of money that had nothing whatsoever to do with the car. Moreover, as the People note, the $50,000 check was deposited nine days before the withdrawal and purchase of the car. Therefore, there is no

evidence that defendant intended to obtain the car when she made, possessed and deposited the $50,000 check.

In their sentencing memo, the People asserted that the objective of the check conviction was different than that of the other crimes and was committed at a different place and time, therefore section 654 did not apply and defendant should receive a consecutive term for it. Defendant did not respond to this either in writing or at the sentencing hearing. Although, as defendant correctly points out, the sentencing court did not make findings concerning the application of section 654 to this offense, the People's sentencing memo put the court on notice of the issue and the court's imposition of a consecutive term was an implied finding that it did not. Substantial evidence supports that implied finding, therefore, it will be upheld. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

b. *Consecutive terms*

The sentencing court imposed consecutive terms for the check, identity theft and drug possession convictions, without stating reasons for doing so.[4] The matter will be remanded so the trial court may state reasons for imposing consecutive terms for these convictions, and, if none exist, to impose concurrent sentences.[5]

---

[4] It also did for the burglary, as previously noted.

[5] In their brief, the People conceded that the matter should be remanded to permit the sentencing court to determine whether to impose consecutive or concurrent sentences for these convictions. At oral argument, the People had a change of heart and asserted that remand was appropriate only to permit the trial court to state reasons for imposing consecutive terms for them.

c. *Restitution*

At the sentencing hearing, the prosecutor stated that he did not have an amount of restitution to present to the court. The court said it would reserve jurisdiction over restitution and "we can have a hearing if one's necessary in the future." The court then informed defendant that she had a right to be present at any restitution hearing with her attorney, but if she allowed her attorney to handle the matter alone, she did not need to be present. The court explained, "Why I say that is because if you attend the restitution hearing, should one be set, you would lose good time credit while you were down here attending that hearing." The court then invited defendant to speak to her attorney about waiving her right to be present for a possible restitution hearing. After a discussion held off the record, defense counsel announced that his client would waive her presence at such a hearing. The court asked defendant if she understood her right to be present. She said she did. The court asked her if she waived her presence and she said she did. The court found that her waiver was knowing and intelligent.

The parties agree that the sentencing court's statement to defendant, that she would lose good time credit while attending a restitution hearing, was incorrect. Defendant points out that a waiver based on erroneous advice is not voluntary. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1223.) The People concede that it is possible defendant's waiver is involuntary. However, they assert that the error is harmless because the record before us does not show that any such hearing occurred.

It is for this court to determine, de novo, whether a waiver is voluntary. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.) Under the circumstances here, defendant's was not.

Had a restitution hearing been conducted in her absence, she would bear the burden of showing prejudice due to it. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) The People contend that since there is no showing that such a hearing occurred, she cannot possibly show prejudice. However, with the finding that her waiver was involuntary, we can, and will, order the trial court to remove from the minutes the reference to her waiving her presence at a restitution hearing.

DISPOSITION

The trial court is directed to stay the sentence for the burglary pursuant to section 654, and to note this in the minutes of the sentencing hearing on remand and in the amended abstract of judgment. The court is further directed, when completing the amended abstract, to show that defendant was convicted in count two of second degree burglary, not first, as the current abstract states, and of possession of methamphetamine for sale, not possession of cocaine, as the current abstract appears to state. The court is further directed to strike from the minutes of the sentencing hearing the reference to defendant having waived her presence at any future restitution hearing. The matter is remanded for the trial court to state reasons for imposing consecutive terms on the check, identity theft and drug convictions (counts 3-6), and if no reasons exist, to impose concurrent sentences for them. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

McKINSTER
J.

KING
J.